United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6052

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6052

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SAMUEL M. KAYNARD, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

P/S

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6052

SAMUEL M. KAYNARD, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

I. STATEMENT OF THE ISSUES

1. Whether the district court committed reversible error by failing to apply the correct standards for injunctive relief under Section 10(l) of the National Labor Relations Act as amended.

2. Whether the district court committed reversible error in failing to find that there was reasonable cause to believe that Respondent-Appellee violated Sections 8(e) and 8(b)(4)(i)(ii)(A) and (B) of the Act.

3. Whether the district court committed reversible error in failing to issue "just and proper" interim injunctive relief pending the Board's final decision in the underlying unfair labor practice proceeding.

II. STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of New York per Honorable Mark Constantino denying a petition for a temporary injunction under Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 199, 73 Stat. 544, 29 U.S.C. Section 160(1)) ("the Act"), filed on behalf of the National Labor Relations Board ("the Board") by Samuel Kaynard, Regional Director of the Twenty-ninth Region of the Board ("the Regional Director"), petitioner-appellant herein. The order of the Court below was entered on February 4, 1976 predicated upon a memorandum entered by the Court on February 4, 1976 (A. 203). [1/] Notice of Appeal was filed on March 4, 1976. Jurisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28 of the United States Code.

A. The Proceedings Below

The petition for an injunction filed with the district court on July 22, 1975 was based on a charge filed with the Board's Regional Director on June 27, 1975 by Bader Brothers Warehouses, Inc. (Hereinafter referred to as "Bader Warehouses"), alleging that Respondent-Appellee International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 814, (hereinafter referred to as "the Union") had engaged in and was engaging in unfair labor practices within the meaning of Section 8(e) and Sections 8(b)(4)(i)(ii)(A) and (B) of the Act, which sections proscribe so-called "hot-cargo" agreements and "secondary boycotts", respectively.

After investigation of the charge, the Regional Director concluded that the Union was engaging in the unfair labor practices charged and that a complaint should issue. [2/] Accordingly, the Regional Director, as required by

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1/ "A" references are to the Joint Appendix accompanying the briefs.

2/ The complaint was issued on August 6, 1975 (Board Cases No. 29-CC-476 and No. 29-CE-33), and a hearing was held before Administrative Law Judge Paul Bisgyer on September 17 and 18, 1975. Judge Bisgyer issued his decision and recommended order on January 28, 1976 in which he recommended that the complaint be dismissed (A. 181-202).

Section 10(1) of the Act, filed with the District Court a petition for injunctive relief pending final disposition by the Board of the unfair labor practice charges (A. 3-16). The Union filed an Answer in substance denying the allegations of the petition (A. 17-23), and a hearing was held before the Court on July 25, 1975 (A. 24-25). Further proceedings on the injunction were then postponed to permit the parties to attempt voluntarily to resolve the matter (Ibid.). Voluntary resolution of the dispute was not achieved, and on October 6, 1975, the parties stipulated to the Court that the testimony and exhibits adduced before the Administrative Law Judge in the underlying unfair labor practice charges would also constitute the record before the Court (A. 26-27).

B. Statement of the Facts

The facts shown by the testimony and exhibits stipulated into evidence below are substantially uncontroverted and may be summarized as follows:

1. Background

Bader Brothers Warehouses, Inc., Bader Brothers Van Lines, Inc., and Bushwick Trailers, Inc. (hereinafter referred to individually as "Bader Warehouses", "Bader Van Lines" and "Bushwick", respectively, and collectively as "the Bader Companies"), are related corporations with common stockholders and common officers (A. 77, 82, 83). Herman Bader, the Bader Companies' president, formulates a common labor policy for the Bader Companies, which is administered by Fred Bauer, a relative of the Baders and the Bader Companies' general manager (A. 83, 84, 89, 92).

Prior to March 26, 1975 Bader Warehouses was engaged in the business of local moving and storage of household and other goods (A. 50). Bader Van Lines performed long-distance, interstate moving services, using drivers supplied by Bader Warehouses and independent owner-operators (A. 83, 94, 95).

Bushwick was engaged in the business of buying, selling and leasing trucks, trailers, tractors and other vehicles (A. 49(a), 50). Bushwick's equipment was leased to Bader Warehouses and Bader Van Lines for use in their operations, as well as to stranger companies or independent owner-operators (A. 93-95). The Bader Companies maintained their principal office and place of business at 475 Underhill Avenue, Syosset, New York, a warehouse facility owned by Bader Warehouses (A. 50, 71). The Syosset facility also houses a vehicle repair shop which was owned and operated by Bushwick (A. 84).[3/]

2. The Collective Bargaining Agreement

Since 1952, Bader Warehouses and the Union have maintained a continuous collective bargaining relationship with respect to Bader Warehouses' chauffeurs, warehousemen, packers, hi-lo operators, checkers and helpers employed at the Syosset facility (A. 51,85,105,124-138). Their most recent contract, initially negotiated by the Union with various employer associations and independently executed by Bader Warehouses, was for a three year term running from April 11, 1974 through March 31, 1977 (A. 50, 51, 124). The contractual bargaining unit is a multi-employer unit consisting of the covered employees of all employer-members of the signatory associations and all independent employers separately signing the agreement (A. 76, 124).

Bader Van Lines and Bushwick were not individually signatory to the agreement. However, Bader Van Lines regularly utilized employees of Bader Warehouses in its long-distance moving operations, and on those occasions, the employees remained subject to the terms of the agreement pursuant to a verbal understanding reached in 1971 and, presumably, pursuant to Article 25(A), entitled "Contract Employees", of the collective bargaining agreement (A. 51,76(a),131,132).

3/ On this record, the Administrative Law Judge found the Bader Companies to constitute a single, integrated employer for the purposes of the Act (A. 183). The Union did not except to this finding before the Board.

Article 50 of the current contract, entitled "Parties Bound", provides, in pertinent part (A. 136-137):

> B. This Agreement shall also be binding upon the successors, administrators, executors and assigns of the parties either signatory hereto, or who are by membership in an Association as above set forth bound to the terms hereof. In the event an entire operation or part thereof, is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceeding, such operation or part of an operation shall continue to be subject to the terms and conditions of this Agreement during the term hereof. On the sale, transfer, or lease specific provisions of this Agreement shall prevail. It is understood that the parties hereto shall not use any leasing device to a third party to evade this Agreement. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc. of the operation covered by this Agreement, or any part thereof. Such notice shall be in writing and a copy served upon the Union at the time the seller, transferor or lessor executes a contract or transaction as herein described. The union shall also be advised of the exact nature of the transaction excluding financial details. In the event the Employer fails to require the purchaser, transferee or lessee to assume the obligations of this Agreement, the Employer shall be liable to the Union, and to the employees covered, for all damages sustained as a result of such failure to require assumption of the terms of this Agreement; but shall not be liable after the purchaser, transferee or lessee has agreed in writing to assume the obligation of this Agreement.

The contract also provides standard union security and dues check-off provisions (A. 125(a)-127).

3. The Sale to Greyhound

Having decided to terminate its moving and storage business, Bader Companies entered into a series of negotiations with Greyhound Van Lines, Inc. (herein "Greyhound"), which culminated in a September, 1974 agreement for the sale to Greyhound of most of the physical assets used in Bader Warehouses' moving and storage operation. As part of this transaction, Bader Warehouses entered into a 10-year lease of its Syosset facility to Greyhound (A. 52,142,155-171). [4/] The purchase-sale agreement did not include Bader Warehouses' goodwill, trade

4/ Earlier, in May of 1973, Bader Warehouses sold another warehouse facility in Brooklyn, New York, to Coventry Van Co. (A. 81).

names, customer lists, accounts receivable, Federal and state certificates, certain lots of unclaimed household furniture, and about five tractors or trailors as well as several personal cars (A. 53-54).

The assets and the leased premises were gradually transferred to Greyhound, which formed a subsidiary corporation, Golden Cycle Van and Storage of New York (hereinafter "Golden Cycle"), to conduct the Syosset operation. (A. 38) On March 17, 1975, Bader Companies' general manager Fred Bauer met with Bader Warehouses' employees and told them that the Bader Companies was going out of the moving and storage business, and, therefore, they were being discharged (A. 90-91). The same day, Golden Cycle took possession of the assets and premises and began hiring employees (A. 38, 47). By March 25, the transfer was complete and, as of September 17, 1975 Golden Cycle had hired 15 employees, one of whom was a former Bader Warehouses employee (A. 49,54,121).

Although out of the moving and storage business, the Bader Companies continued to occupy space at the Syosset facility to wind up that portion of its affairs but moved its principal place of business to president Herman Bader's home. The Bader Companies remains as a viable business entity, and the owners contemplate going into some other kind of business (A. 54-55, 79). The Companies, through Bushwick, actively continue in the business of buying, selling and leasing trucks, tractors, trailors and other vehicles (A. 75, 77-78). The sale and lease of such vehicles occur in the normal course of business in the moving and storage industry (A. 69-70,120,120(a)).

4. The Union's Demands on the Bader Companies and Golden Cycle

On March 18, Union Business Agent Doran visited general manager Bauer at his office. In response to Doran's inquiries, Bauer informed him that the Bader Companies was discontinuing its moving and storage operations (A. 89-90). On March 19 and 20, Doran and business agent Denetra visited Golden Cycle's manager, William Cross, and asked whether Golden Cycle would honor the Union's contract with Bader Warehouses (A. 41-43). Cross indicated that Golden Cycle's operations would differ from Bader Warehouses' so that the contract might not meet their needs, and suggested that a compromise agreement might be worked out. Doran rejected this idea. Before departing, Doran and Denetra asked whether Golden Cycle would employ the former employees of Bader Warehouses. Cross responded that he would accept employment applications from them, as well as other applicants, and would hire those persons who fit Golden Cycle's requirements (A. 43). The Union made no further requests for employment of former Bader Warehouse employees until the subsequent hearing on the unfair labor practice charges. (A.45-46, 50(a)).

On March 20, the Union's president, Vincent Bracco, sent a telegram to "Bader Brothers, Inc." essentially demanding that the Bader Companies immediately comply with all the explicit requirements of Article 50(B) of the Union contract (A. 55-56,172-173). On March 21, 1975, Golden Cycle received a telegram from the Union demanding that Golden Cycle assume the obligations of the contract (A. 44-45,123(a)-123(b). On March 25, Herman Bader informed the Union that he had turned his telegram over to Golden Cycle (A. 110). On March 26, Golden Cycle sent the Union a letter to the effect that it would not be profitable for them to abide by the contract because of the difference in operations (A. 110).

On March 26, 1970, the Union established a picket line on the sidewalk in front of the Syosset facility. The signs carried by the pickets read as follows (A. 46, 121(a)):

> LOCAL 814, I.B. OF T. ON STRIKE AGAINST GOLDEN CYCLE VANS, OF NEW YORK, INC. AND BADER BROTHERS. NO DISPUTE WITH ANY OTHER EMPLOYER.

The same day, the Union requested the Moving and Storage Joint Labor-Management Board, established by the contract to resolve disputes, to provide an appropriate remedy for Bader Warehouses' failure to comply with Article 50(B) (A. 57, 174).[5/] At the Union's request, on May 7 the parties entered into a stipulation to bypass the Joint Board and submit their dispute directly to arbitration (A. 58-60, 175-176). Thereafter, arbitration proceedings were instituted, an arbitrator selected, and a July 14 hearing date was established (A. 61, 180). Upon the filing of the instant petition for an injunction on July 22, 1975 in the court below, the Union's picketing was voluntarily halted pending the outcome of the petition (A. 25, 36).[6/] Similarly, the arbitration proceedings were stayed during the pendency of the petition (A. 102-103).

C. The District Court's Memorandum and Order Denying Injunctive Relief

On this record the Court below issued the following Memorandum and Order (A. 203):

> Petitioner, Director of Region 29 of the National Labor Relations Board, contends that he has reasonable cause to believe that respondent Union Local has engaged in certain unfair labor practices. He applies for injunctive relief. In a decision dated January 28, 1976, Judge Paul Bisgyer of the National Labor Relations Board held that Respondent did not engage in the unfair labor practices charged by petitioner. After a review of this decision and the entire record, this Court must conclude that

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5/ The Union admittedly seeks damages from Bader Warehouses pursuant to Article 50(B) (A. 123).

6/ To the best of our current knowledge, the picketing has not resumed.

petitioner does not have reasonable cause to believe that respondent has engaged in the charged unfair labor practices. Accordingly, the application for injunctive relief is denied.

We show below that the district court committed reversible error by (1) failing to issue findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure; (2) giving controlling weight to the Administrative Law Judge's findings, conclusions, and recommended order; (3) concluding that there is not reasonable cause to believe that the Union violated Sections 8(a)(4)(i)(ii)(A) and (B) and 8(e) of the Act; (4) failing to issue "just and proper" interim injunctive relief pending the Board's final disposition of the unfair labor practice charges.

ARGUMENT

I. THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF WAS SOUGHT: THE APPLICABLE STANDARDS

Section 10(l) of the Act [7/] empowers district courts to grant "just and proper" injunctive relief pending the Board's final resolution of unfair labor practice charges made subject to its provisions. In brief, Section 10(l)

7/ Section 10(l), as amended, in pertinent part provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of Section 8(b), or Section 8(e), or Section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question had occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * Upon filing of any such petition the courts shall cause notice thereof to

(Continued)

embodies the determination of Congress that certain unfair labor practices, most notably secondary boycotts, give or tend to give rise to such serious interruptions to commerce as to require their discontinuance, pending adjudication by the Board on the merits, to avoid irreparable injury to the policies of the Act and the frustration of the statutory purpose which otherwise would result. See, S. Rep. No. 105, 80th Cong., 1st Sess., 8, 27, I Legislative History of the LMRA, 1947 (G.P.O., 1948), a portion of which is reporduced in Danielson v. Joint Board of Coat, Suit & Allied Garment Workers Union, 494 F.2d 1230, at 1241-42 (C.A. 2, 1974). Therefore, Congress imposed a mandatory duty upon the Board's Regional Director to seek injunctive relief in the appropriate district court if, upon investigation of the charge, he has reasonable cause to believe a violation has occurred.

Since the injunction proceeding under Section 10(1) of the Act is ancillary to the main unfair labor practice case, and since any injunction issued thereunder is interlocutory in nature and expires upon the Board's rendering its final decision, "it is well-settled that the district court need not decide that an unfair labor practice has acutally occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act." Danielson v. International Organization of Masters, Mates and Pilots, AFL-CIO, 521 F.2d 747, 751 (C.A. 2, 1975). Accord: Seeler v. Trading Port, Inc., 517 F.2d 33, 36 (C.A. 2, 1975) and cases there cited. 8/

7/ (Cont'd)
be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promotion or protecting the interests of employee members. * * *

8/ Trading Port arose out of a Section 10(j) proceeding. However, as this Court observed, 517 F.2d at 36, n. 5, in this Circuit, "the district court should apply the same standards in Section 10(1) cases as it does in Section 10(j) cases." See Danielson v. Joint Board, supra, 494 F.2d at 1242.

This "reasonable cause" standard does not require the Board to adduce evidence to the extent required for enforcement of a Board order after a full hearing on the merits. Nor is the district court required to resolve disputed issues of fact or credibility. Instead, the court's function is limited to a determination of whether such issues could ultimately be resolved by the Board in favor of the petitioner (i.e., the Board's Regional Director). See Balicer v. International Longshoremen's Association, AFL-CIO, 364 F. Supp. 205, 225-226 (D.C.D.N.J., 1973), aff'd., 491 F.2d 748 (C.A. 3, 1973); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 546 (C.A. 9, 1969); Kennedy v. Sheet Metal Workers, Local 108, 289 F. Supp. 65, 91 (D.C.C.D. Cal., 1968), quoted with approval and applied in Wilson v. Milk Drivers Local 471, 491 F.2d 200, 206 (C.A. 8, 1974). Indeed, as this Court has stated, where there are "disputed issues of fact . . ., the Regional Director should be given the benefit of the doubt . . ." Seeler v. Trading Port, Inc., supra, 517 F.2d at 36-37; Accord: Danielson v. International Organization of Masters, Mates and Pilots, supra, 521 F.2d at 751; Danielson v. Joint Board, supra, 494 F.2d at 1245.

It is equally well-settled that the legal theory advanced by the Regional Director need not be finally established, and that even where the proposition of law is unsettled or is one of first impression, "the district court should be hospitable to the views of the /Regional Director/, however novel." Danielson v. Joint Board, supra, 494 F.2d at 1245. Accord: Danielson v. International Organization of Masters, Mates and Pilots, supra, 521 F.2d at 751 ("The district court should defer to the statutory construction urged by the Board").

While, in disagreement with other courts of appeals, this Court held in Danielson v. Joint Board, supra, that the "reasonable cause" standard requires a showing of "at least some significant possibility that the Board will enter an

enforceable order," 494 F.2d at 1244, and that in cases involving novel legal theories, the district court should not grant an injunction if, "after full study, the district court is convinced that the General Counsel's legal position is wrong," Id., at 1245, [9/] it is clear that the Court did not intend to depart from the otherwise settled rule in this and other circuits that "the Board, rather than the district courts, remains the 'primary fact finder' and 'primary interpreter of the statutory scheme', subject to judicial review by a court of appeals pursuant to Sections 10(e) and (f)." McLeod v. National Maritime Union of America, AFL-CIO, 457 F.2d 490, 494 (C.A. 2, 1972); McLeod v. National Maritime Union of America, AFL-CIO (Commerce Tankers), 457 F.2d 1127, 1133 (C.A. 2, 1972). Nor did the Court issue an open invitation to the district courts to make independent determinations of what the law should be. Rather, the decisions of this Court make it clear that mere disagreement of the district court with the Board's position, or even outstanding judicial decisions which are adverse to that position, do not alone negate "reasonable cause." McLeod v. National Maritime Union (Commerce Tankers), supra, 457 F.2d at 1137-1139, cited with approval in Seeler v. Trading Port, supra, 517 F.2d at 36; Kaynard v. Independent Routemen's Association, 479 F.2d 1070, 1072 (C.A. 2, 1973); McLeod v. A.F.T.R.A., 234 F. Supp. 832, 333 (D.C. S.D.N.Y., 1964), aff'd. 351 F.2d 310 (C.A. 2, 1965). Indeed, the court in Danielson v. Joint Board, supra, specifically warned (494 F.2d at 1245):

> Prospective picketers should not take our decision here as saying more than it does. When "reasonable cause to believe" turns on disputed issues of fact, the Regional Director may assume these in favor of the charge and the district court should sustain him if his choice is within the range of rationality. If differing inferences may fairly be drawn from the facts he has found, he may choose the one more favorable to the charging party, and this too should be upheld. Even on an issue of law, the district court should be hospitable to the views of the General Counsel, however novel.

9/ As this Court recognized, the standard generally applied is that the Regional Director's factual allegations and propositions of law must not be "insubstantial and frivolous." 494 F.2d at 1230-1240.

While the theory of violation as applied to the particular facts in this case may not be dispositively settled by the Board or the courts, this case is far removed from the situation in Danielson v. Joint Board -- a case in which this Court characterized the proposition of law as being "a new adventure . . . in the interpretation of a statute fourteen years after it had come on the books," 494 F.2d at 1245, an "effort to stretch" the prohibitions of the Act so far that even if the Board found a violation, "the order would not be enforced unless some new facts or legal theories should appear." Id., at 1237, 1239. Rather, as we will demonstrate, infra, the Regional Director here has pursued a statutory construction which has been consistently urged by the Board's General Counsel and which has been accepted by the Board, with this Court's affirmance, in cases similar, although not identical, to the present one. Although its application to the facts in this case may extend into an area of some uncertainty before the Board, and one specifically left open by this Court, the Regional Director hardly embarked on "a new adventure in . . . the interpretation of /the Act/," and was therefore entitled to the benefit of this Court's adjuration that the court below at least remain "hospitable" to his views.

However, instead of showing deference to the Regional Director's interpretation of the Act, the district court summarily denied the petition for injunction, apparently placing its primary reliance upon the issuance of the Administrative Law Judge's decision and recommendation that the complaint be dismissed. By so doing, the court committed two-fold error.

While an Administrative Law Judge must make resolutions of factual and credibility conflicts arising during the proceedings, and must apply the "preponderance of the evidence" test to the alleged violation, that is not the district court's role when reviewing a petition for a Section 10(l) injunction.

Indeed, as shown above, not only must the district court refrain from supplanting the Board as the "primary fact finder", but it should preliminarily resolve factual disputes in favor of the Regional Director and accept all reasonable inferences drawn therefrom by the Regional Director. By adopting the findings of the Administrative Law Judge, the Court below stepped outside the appropriate limitations upon the scope of its inquiry in a 10(1) proceeding.

Secondly, by apparently treating the opinion of the Administrative Law Judge as definitive on the question of reasonable cause, the court below failed to recognize that that decision is not a final adjudication of the issues before the Board, particularly where, as here, the General Counsel has timely filed exceptions to the decision. As the Ninth Circuit stated in Newspaper Guild v. Kennedy, supra, 412 F.2d at 544, n. 1, "we are not bound by the /Administrative Law Judge's/ decision in the case at bar because different standards govern the issuance of a preliminary injunction and because the decision of the /Administrative Law Judge/ is not a final administrative decision," citing Slater v. Denver Building and Construction Trades Council, 175 F.2d 608 (C.A. 10, 1949). See also, Madden v. Automobile Mechanics, 46 LRRM 2572, 2575 (D.C. N.D. Ill., 1960). Cf. Penello v. International Longshoremen's Association, Local 1248, 455 F.2d 942 (C.A. 4, 1971). This court has itself recognized that the recommended dismissal of the underlying unfair labor practice charge by an Administrative Law Judge is not determinative of whether a Section 10(1) injunction should issue. In McLeod v. National Maritime Union (Commerce Tankers), supra, this Court granted a Section 10(1) injunction, based essentially on the same theory of violation urged in this case, even though the Administrative Law Judge had found no Section 8(e) violation and recommended the dismissal of the unfair labor practice complaint. 457 F.2d at 1135, n. 9.

Finally, as we will now show, applying the appropriate standards, the record in this case fully supports a finding of reasonable cause to believe that a violation has occurred. For, while the issue is not without doubt, there is certainly a "significant possibility" that the Board will agree with the General Counsel's theory, and a substantial likelihood that this Court would affirm a finding of a violation, if made.

II. THE COURT BELOW ERRED IN FAILING TO FIND THAT THERE IS REASONABLE CAUSE TO BELIEVE THAT THE UNION'S CONDUCT VIOLATED SECTIONS 8(e) AND 8(b)(4)(i)(ii)(A) AND (B) OF THE ACT

A. Applicable Principles of Law

Sections 8(b)(4)(i)(ii)(A) and (B) of the Act make it unfair labor practices for a labor organization or its agents:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by Section 8(e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

Section 8(e) of the Act makes it an unfair labor practice for a labor organization and an employer:

> to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: * * *

These provisions together implement the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding employers and others from pressures in controversies not their own. N.L.R.B. v. Denver Bldg. and Construction Trades Council, 341 U.S. 675, 692 (1951); National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 620-627 (1967); N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe), 400 U.S. 297, 302-303 (1971).

Thus, Section 8(b)(4)(B) does not prohibit a union from taking traditional primary action against an employer in furtherance of a dispute with that employer, e.g., appealing directly to its employees, by picketing or otherwise, not to perform services. It does, however, prevent a union from bringing pressure to bear indirectly on that employer by exerting pressure on other, unoffending persons, in furtherance of such disputes. And, as the Supreme Court explained in National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 633-634 (1967), Section 8(e) was designed to implement and reinforce the existing proscriptions against secondary boycotts contained in Section 8(b)(4) of the Act, by prohibiting a union from achieving an unlawful secondary boycott through an agreement with the boycotting employer.

Thus, as the Supreme Court articulated, Congress intended that Section 8(e) would embody the same distinction made in Section 8(b)(4) between lawful "primary" and unlawful "secondary" boycott activity, and would apply only to agreements having "'secondary' objectives." National Woodwork, supra, 386 U.S. at 620, 623-639. Congress, the Court concluded, "had no thought of prohibiting agreements directed to work preservation." Id. at 640. Hence, the general test for determining the legality of a "hot cargo" agreement under Section 8(e) is whether the particular agreement or its maintenance "is addressed to the labor relations of the contracting employer vis-a-vis his own employees" or is "tactically calculated to satisfy union objectives elsewhere." National Woodwork,

supra, 386 U.S. at 644-645. Houston Contractors Association v. N.L.R.B., 386 U.S. 664, 668 (1967). If the former, the agreement has essentially a primary thrust and does not fall within the interdiction of Section 8(e); if the latter, it is secondary in nature and proscribed by Section 8(e).

Therefore, while a union and an employer may lawfully enter into an agreement having the valid primary purpose of protecting the jobs of the employees in the immediate work unit, they may not enter into an agreement whose thrust is to reach beyond the confines of the bargaining unit to affect the terms and conditions of employees of another employer. Such agreements are secondary in design and impact, for they are not limited to the "labor relations of the contracting employer vis-a-vis his own employees," but are "tactically calculated to satisfy union objectives elsewhere," and are proscribed by Section 8(e). See, e.g., McLeod v. National Maritime Union (Commerce Tankers), supra, 457 F.2d at 1134.

Finally, Section 8(b)(4)(A) of the Act prohibits a union from forcing an employer to enter into a contract proscribed by Section 8(e) or from subsequently reaffirming such an agreement through attempts at forcing compliance therewith. See, e.g., N.L.R.B. v. International Brotherhood of Teamsters, Local 294, 342 F.2d 18, 21 (C.A. 2, 1965); N.L.R.B. v. Milk Wagon Drivers' Union, Local 753, 335 F.2d 326, 328-329 (C.A. 7, 1964); District No. 9, IAM v. N.L.R.B., 315 F.2d 33, 35 (C.A.D.C., 1962); Los Angeles Mailers Union v. N.L.R.B., 311 F.2d 121, 123-124 (C.A.D.C., 1962).

Thus, Sections 8(e) and 8(b)(4)(A) and(B) complement each other, by proscribing secondary boycotts obtained by strikes, threats or coercion (Section 8(b)(4)(B)), by banning contractual arrangements by which an employer agrees to engage in a secondary boycott (Section 8(e)), and by prohibiting conduct aimed at obtaining or reaffirming such an agreement (Section 8(b)(4)(A)).

Applying these principles to the facts presented, there is reasonable cause to believe the Union violated the Act as alleged.

B. Article 50(B) Violates Section 8(e) of the Act and the Union's Demand for Arbitration and Picketing to Enforce it Violates Section 8(b)(4)(A)

Article 50(B) of the collective bargaining agreement between the Union and Bader Warehouses provides that Bader Warehouses may sell all or any part of its business only to a buyer who agrees to be subject to all the terms and conditions of the contract. It further provides that, should Bader Warehouses sell its business to a buyer who fails to assume the contract, Bader Warehouses shall be liable for "all damages sustained as a result of such failure to require assumption of the terms" of the contract until the buyer agrees in writing to assume the contract.

Thus, on its face, Article 50(B) requires a cessation of business between Bader Warehouses, as lessor or transferor, and any potential buyer, as lessee or transferee, who will not agree to accept the terms of the Union's collective bargaining contract. 10/ Accordingly, the contract prima facie is violative of Section 8(e) of the Act. The Union's demand for enforcement by way of arbitration is a "reaffirmation" of Article 50(B) amounting to a new "entering into" of the violative clause within the six month statute of limitations provided by Section 10(b) of the Act. See Danielson v. International Organization of Masters, Mates and Pilots, supra, 521 F.2d at 754.

Since Article 50(B) is violative of Section 8(e) of the Act, the Union's attempt to enforce that provision by way of arbitration, as well as by picketing, is an independent violation of Section 8(b)(4)(A). See N.L.R.B. v. International Brotherhood of Teamsters, Local 294, supra 342 F.2d at 21; N.L.R.B.

10/ While it may be argued that the clause does not expressly prevent a signatory employer from selling its business to anyone, the damages provision of Article 50(B) permits the sale to a non-consenting purchaser only under such onerous conditions that it plainly is intended to coerce compliance with the clause rather than to give the employer a reasonable alternative to compliance. See Danielson v. International Organization of Masters, Mates and Pilots, supra, 521 F.2d at 753; N.L.R.B. v. Local Union No. 28, Sheet Metal Workers, 380 F.2d 827, 829-830 (C.A. 2, 1967).

v. Milk Wagon Drivers Union, Local 753, supra, 335 F.2d at 329 (" . . . any attempt to have /a Section 8(e) clause/ enforced by the Union would have constituted an attempt to 'enter into' it within the meaning of Section 8(b)(4)(A)"); Kennedy v. Sheet Metal Worker's International Association, Local 108, 289 F. Supp. 65, 83 (D.C.C.D. Calif., 1968); Youngblood v. United Mine Workers, 89 LRRM 2314 (D.C.E.D. Okla., 1975).

The Union argued below and before the Administrative Law Judge that Article 50(B) is privileged under National Woodwork as a primary, work preservation agreement, and that, in any event, the sale of a business is not a "doing business" within the intendment of Section 8(b)(4)(B) or Section 8(e).

With respect to its first contention, the Union asserts that Article 50(B) was designed to and has the effect of requiring any purchasing employer to retain the former Bader Warehouses employees, thereby preserving the work to them. However, by its terms, Article 50(B) plainly commits Bader Warehouses only to require a purchaser to assume the collective bargaining agreement, including such non-economic terms as recognition, union security, and dues checkoff, and does not commit Bader Warehouses to require a purchaser to retain Bader Warehouses' former bargaining unit employees. In fact, nowhere in the agreement, either in Section 50(B) or elsewhere, is any such requirement articulated.

The Union argues, and the Administrative Law Judge apparently agreed (A. 186), that Article 21(H) of the contract supports the view that Article 50(B) is meant to require retention of unit employees. Article 21(H) provides (A. 129):

> Whenever one company is absorbed by, merged with, purchased or acquired by any manner by another company, the employees of both companies shall be integrated into one seniority list by their dates of original employment.

However, this provision, by its terms, refers to the acquisition rather than the sale of a business enterprise. Moreover, when Article 21 (A.127-130) dealing with seniority, is read in full, it becomes clear that Paragraph 21(H) relates only

to the merger by purchase or otherwise of two companies already signatory to the contract. Indeed, Article 21 requires each covered employer to compile and maintain a seniority list of all contractually defined eligible employees, within their contractually determined job classifications. Thus, it would be virtually impossible to merge a contractually dictated seniority list with whatever alien seniority system, if any, a non-signatory employer may have maintained. This interpretation of the contract is further buttressed by the fact that Article 51 (A. 137) does encompass situations in which a contracting employer purchases a non-signatory company.

In these circumstances, the reliance by the Union and the Administrative Law Judge, who accepted the Union's argument, (A. 182, 186), on testimony by the Union's Secretary-Treasurer regarding his interpretation of Section 50(B) (A. 115-116, 122-123),[11/] is clearly misplaced. For the Board has long held that in determining the validity of a clause under Section 8(e) of the Act, "if the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e)." Only if the clause is ambiguous will the Board "consider extraneous evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner." General Teamsters, Local 982, 181 NLRB 515, 517 (1970), enf'd. sub nom. Joint Council of Teamsters No. 42 v. N.L.R.B., 450 F.2d 1322, 1323, n. 1 (C.A.D.C., 1971).

In any event, the record here does not support the Union's argument. Thus, as shown above, pp. 7-8, the Union never demanded, either orally or in its written communications with the Bader Companies and Golden Cycle, that Golden

11/ The Administrative Law Judge found that the Union's Secretary-Treasurer testified that Article 50(B) was first negotiated into the contract in 1965 to assure jobs for its members. But it is not clear from the record that the Secretary-Treasurer was even on the 1965 negotiating team (A. 122). Indeed, the Secretary-Treasurer's testimony did not even purport to refer to the intent of the parties in negotiating the clause, but refers only to the Union's alleged purpose in attempting to enforce it (A. 115-116,122-123).

Cycle be required to employ the former Bader Warehouses' bargaining unit employees. With but one minor exception those communications were directed solely to the Union's demand that Golden Cycle adopt the existing collective bargaining agreement. On March 20, Union business agents did mention the former Bader Warehouses employee complement to Golden Cycle; but even then, they merely inquired in passing whether Golden Cycle would hire the Bader Warehouses employees, and did not further press the point when told that Golden Cycle would consider applications from those employees along with those from other applicants. It was not until the hearing before the Administrative Law Judge that the Union was to assert a demand for jobs for the former employees under Article 50(B).

Therefore, it is submitted that on this record, there is at least reasonable cause to believe that the purpose and effect of Article 50(B) is not to assure that the bargaining unit employees will retain their jobs upon a sale or transfer of a signatory employer, but simply to assure that the purchasing employer will be bound by the existing contract. 12/

But even assuming, arguendo, that Article 50(B) may be interpreted to require the retention of the unit employees, a clearly primary, work preservation object, the additional requirement that the purchaser assume the Union's contract is just as plainly secondary in nature. For, once the employees' jobs are preserved by their mandatory employment by the purchaser, the contract assumption requirement becomes superfluous to any work preservation interest and attempts, instead, to set the conditions of employment of another

12/ Although the Administrative Law Judge, evaluating the Union's testimony in light of the conflicting evidence, reached a contrary resolution of this factual dispute, it would be outside the district court's proper scope of inquiry in a Section 10(l) injunctive proceeding likewise to resolve the dispute in the Union's favor since the opposite finding, urged by the Regional Director, is at least equally reasonable. See the discussion and cases cited supra, pp. 13-14.

employer.[13] Such a purpose has no relationship to the labor relations of Bader Warehouses "vis-a-vis its own employees," but obviously is "tactically calculated to satisfy union objectives elsewhere." National Woodwork, supra.[14]

Finally, even if it could be successfully argued that the Union has a legitimate, primary interest in protecting for unit employees hired by the purchaser the working conditions negotiated on their behalf with the seller,[15] Article 50(B) goes far beyond that interest. By requiring the signatory employer to obtain a commitment from the purchaser to adopt the entire bargaining agreement, including such non-economic provisions as union security, recognition and dues checkoff, the Union protects not the employees' jobs or working conditions, but, rather, the institutional interests of the Union itself. Thus,

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13/ In N.L.R.B. v. Burns International Security Services, 406 U.S. 272, the Supreme Court held that even a successor employer, who has a duty to bargain under the Act with the majority representative of its employees, is not bound to the terms of the predecessor employer's contract. Article 50(B) attempts to place such an obligation on a purchasing employer. It is equally important to note that Article 50(B) relates directly to and interferes with the employer's decision to sell its business, a decision which lies at the "core of entrepeneurial control" and is therefore not a mandatory subject of bargaining. General Motors Corp., 191 NLRB 951, 952, enf'd. 470 F.2d 422 (C.A.D.C., 1972).

14/ As this Court noted in Danielson v. International Organization of Masters, Mates and Pilots, supra, 491 F.2d at 753, the fact that Article 50(B) is aimed at other rival u[illegible], therefore increasing the probability of inter-union conflict, is a re[illegible]nt factor in determining that such a clause would advance the union's own organizational goals rather than merely serving to preserve the jobs of its members. Moreover, although the union does not operate a formal hiring hall, Article 10(P)(1) of the contract allows the union to refer members for employment before an employer can hire anyone not on the job seniority list (A. 125). Therefore, requiring assumption of the contract through Article 50(B) would allow the Union to protect more than the jobs of the present Bader Warehouse employees, but go further to protect the Union's right to future jobs for its members. We submit that this another relevant factor in determining that Article 50(B) is "tactically calculated to satisfy union objectives elsewhere." Cf. N.L.R.B. v. National Maritime Union (Commerce Tankers), 486 F.2d 907, 912-914 (C.A. 2, 1973); Danielson v. International Organization of Masters, Mates and Pilots, supra, 421 F.2d at 752.

15/ In N.L.R.B. v. National Maritime Union (Commerce Tankers), supra, 486 F.2d 913, n. 10 this Court "assumed, without deciding" that a union may legitimately insist by contract that an employer in the maritime industry "may sell no ships unless union standards were preserved," but questioned the legitimacy of this interest in the context of a sale of a business.

Article 50(B) is analogous to a "union signatory" subcontracting agreement, universally recognized as violative of Section 8(e) of the Act. For as this Court has recognized, "If the clause is a union signatory clause, the union has an interest, independent of the interest of the employees being represented, in furthering its own organizational ends . . . ." N.L.R.B. v. National Maritime Union (Commerce Tankers), 486 F.2d 907, 912-913 (C.A. 2, 1973) and cases cited. Accord: Truck Drivers Union No. 413 v. N.L.R.B., 334 F.2d 539, 548 (C.A.D.C., 1964), cert. denied, 379 U.S. 916.

The Union's second contention, that the sale of all or part of a business does not fall within the statutory construction of "cease doing business", has more force. Two members of the Board (Members Fanning and Jenkins) have recently indicated that they would not view the transfer or sale of all, or substantially all, of an employer's capital assets as a "doing of business" within the meaning of Sections 8(b)(4)(B) and 8(e) of the Act. Operating Engineers, Local 701 (Tru-Mix Construction Co.), 221 NLRB No. 124, 90 LRRM 1601 (1975),[16] and this Court has expressed some doubt "/w/hether an isolated sale of a capital item . . . comes within this language." N.L.R.B. v. National Maritime Union (Commerce Tankers), supra, 486 F.2d at 911. However, as already observed, pp. 11-12, the fact that the issue is an open one and the law has not been fully resolved does not constitute a valid basis for denying injunctive relief under Section 10(l) of the Act. In addition to the cases cited above, see Kennedy v. Los Angeles Typographical Union No. 174, 418 F.2d 6, 8 (C.A. 9, 1969) ("Although it may be that the /Union/ will ultimately prevail on the merits, it /is/ clear . . . that the Regional Director's legal propositions are sufficiently sound to meet the 'reasonable cause' requirements of Section 10(l)").

16/ But see Sealtest Foods, 147 NLRB 230 (1964), where the Board considered the sale of milk distribution routs to independent contractors to be "doing business" within the scope of Sectio 8(e). See also Youngblood v. United Mine Workers, supra.

Furthermore, the facts here are more nearly analogous to those in Commerce Tankers Corp., 196 NLRB 1100 (1972), enf'd sub nom. N.L.R.B. v. National Maritime Union, supra, where the Board found a violation, than they are to those in Tru-Mix, where the complaint was dismissed.

In Commerce Tankers, an employer in the maritime industry had agreed to a contract clause to the effect that, in the event of a sale of any of its ships, it would obtain a written undertaking by the purchaser that it would recognize the union and accept the terms and conditions of the existing collective bargaining agreement, including manning requirements. 196 NLRB at 1100. When the employer sold its last remaining ship without complying with the contract's restriction, the union attempted to enforce the agreement by way of arbitration. Finding that "in the maritime industry the sale of a vessel is a fairly common occurrence", Ibid., the Board concluded that "buyers and sellers of ships are doing business with each other within the meaning of Section 8(e)." Id., at 1101. Since the union did not dispute this finding, this Court affirmed, without deciding the issue. 486 F.2d at 911.

Similarly, in the instant case, testimony was adduced during the unfair labor practice hearing that the sale and transfer of vehicles is a normal occurrence within the moving and storage industry, including testimony of the Union's Secretary-Treasurer that the sale of trucks is "very common" in the industry (A. 120, 120(a)). Indeed, the Bader Companies, through Bushwick, has regularly engaged in the buying and selling of such vehicles. In the five year period before the hearing, 49 vehicles were sold by Bushwick in the normal course of business to other companies within the moving and storage industry. Moreover, Bader Warehouses had previously sold a different warehouse to another moving and storage company. In these circumstances, there is certainly reasonable cause to believe that the Board will conclude that in the moving and storage industry,

as in the maritime industry, the sale of vehicles and other related assets is "doing business" within the meaning of Section 8(e) of the Act. See Danielson v. International Organization of Masters, Mates and Pilots, supra; Seatrain Lines, Inc., 220 NLRB No. 52, 90 LRRM 1691(1975).

Nor does the fact that by selling its vehicles and leasing its Syosset warehouse Bader Companies intended to end the moving and storage aspect of its business alter this result. As this Court observed in N.L.R.B. v. National Maritime Union, supra, where the employer's sale of its last remaining vessel was at issue:

> Commerce's sale of its last ship might be compared to an employer's decision to close his factory and terminate his business altogether. But the Supreme Court has noted that the decision to terminate business is peculiarly a matter of management prerogative, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 270 (1965), and we cannot conceive that a union would be entitled to seek more far-reaching job protection in that situation than in the ordinary sub-contracting case. 486 F.2d at 913, n. 10.

Tru-Mix is clearly distinguishable on its facts. There, the contract clause involved provided simply that "This Agreement shall be binding upon the heirs, executors, administrators, successors, purchasers and assigns of the parties thereto." 90 LRRM at 1607. As Chairman Murphy observed in her concurring opinion, this clause, as distinguished from the clauses in Commerce Tankers and in the instant case, "places no inhibitions upon the actions of the contracting employer in his selection or dealing with such a purchaser and requires no commitment or affirmative action on the part of the contracting employer." Therefore, the clause "does not even impliedly seek to compel the employer to cease dealing with any potential purchaser." Id., at 1608. The clause in the instant case resembles those clauses found illegal in Commerce Tankers, supra, and Danielson v. International Organization of Masters, Mates and Pilots, supra, in that it specifically limits the purchaser to whom the Bader Companies may sell all or part of its business, requires affirmative conduct on the part of the contracting Employer, and imposes onerous conditions on any sale of the business not in accord with

with these restrictions. Moreover, unlike in the instant case, there was no evidence in Tru-Mix that the sale of capital assets was a common occurrence in the sand of gravel business.

In sum, the issue in the instant case remains an open question to be decided on the basis of the Exceptions currently pending before the Board from the Administrative Law Judge's decision, and injunctive relief is fully warranted to maintain the status quo pending the Board's decision to prevent irreparable injury to the purposes and policies of the Act.

C. The Union's Picketing was Secondary Activity in Violation of Section 8(b)(4)(B).

Finally, applying the standards of Section 8(b)(4)(B) of the Act to the picketing in the instant case, it is apparent that the Union's picketing at the Syosset warehouse facility was not conducted in such a manner as to shield the unoffending employer from pressures in a controversy not its own. Thus, as shown in the Statement of the Case, the Union picketed the warehouse with signs directed against both the Bader Companies and Golden Cycle. It is apparent that the Union's picketing of Golden Cycle in support of its dispute with the Bader Companies was intended to bring pressure indirectly on the latter employer by exerting pressure on Golden Cycle, an employer not involved in the labor dispute. Such picketing is plainly secondary and unlawful. Los Angeles Building & Construction Trades Council (Silver View Associates), 216 NLRB No. 55, 88 LRRM 1194 (1975).

The Union contended below, and the Administrative Law Judge found (A. 201), that the Union's real dispute was with Golden Cycle because of its refusal to assume the obligations of the collective bargaining agreement, and, therefore, the picketing of Golden Cycle was lawful, primary conduct. But either way the Union would have it, the picketing was clearly violative of the Act. For the picketing was conducted at the Syosset warehouse at a time when the Bader Companies still had a presence there, and the signs specifically named

the Bader Companies as well as Golden Cycle. Assuming the Union was acting in futherance of its dispute with Golden Cycle, it is obvious that at least "an object" of the Union's conduct was to bring pressure to bear against the Bader Companies to force it to put pressure on Golden Cycle to comply with the Union's contract assumption demands, including union recognition, a plain secondary object.

III. THE REQUESTED INJUNCTIVE RELIEF IS JUST AND PROPER

In passing Section 10(j) and 10(l) of the Act, Congress observed that (I. Leg. Hist. at 414):

> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives -- the prompt elimination of the obstructions to the free flow of commerce and the encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. * * *

As recently stated by the First Circuit (Compton v. National Maritime Union, _____ F.2d _____, 91 LRRM 3048, 3053 (April 2, 1976):

> The purpose of the Section 10(l) injunction is to preserve the status quo in order that the ultimate decision of the Board would not be negated or rendered moot by intervening events /,/ . . . to prevent disruptions in the flow of commerce . . . , and to prevent unfair labor practices. (Citations omitted).

Thus, it is settled that under the "just and proper" standard, "/t/he propriety of injunctive relief does not depend upon traditional equitable principles, but whether it is just and proper when the circumstances of a case create a reasonable apprehension that the statutory remedial purpose will be frustrated in the absence of such relief." Wilson v. Milk Drivers Union Local 471, 491 F.2d 200, 203 (C.A. 8, 1974); Squillacote v. Graphic Arts Int. U. (GAIU) Local 277, 513 F.2d 1017, 1023 (C.A. 7, 1975). Of course, the status quo which deserves protection is that which existed before the onset of unfair labor practices. Seeler v. Trading Port, supra, 517 F.2d at 38; Danielson v. Local 275, Laborers Int. U. of No. America, 479 F.2d 1033, 1037 (C.A. 2, 1973).

As shown above, the Union in this case has reaffirmed and sought to enforce, by picketing and through arbitration, Article 50(B) of its collective bargaining agreement, a provision which there is reasonable cause to believe violates Section 8(e) of the Act. The grant of an order enjoining the Union from maintaining and applying Article 50(B) and from attempting to enforce it, by picketing, arbitration, or otherwise, pending the Board's final disposition of the matter, is both just and proper and necessary to prevent a frustration of the policies and remedial purposes of the Act. In the absence of an injunction, the Union may well be able to enforce compliance with the provision either by a resumption of picketing or by insisting upon arbitration and obtaining a favorable award before the Board issues its final decision in the unfair labor practice proceeding. In either event, any subsequent determination of the Board that Article 50(B) is unlawful, and the remedial order issued pursuant thereto, will be ineffective to remedy the violation, which will have become a fait accompli.

There is a further reason that an injunction should issue in this case. Not only may the Board's remedial order be rendered moot by the Union's successful enforcement of the clause pending the Board's final decision, but, if the Board ultimately determines Article 50(B) to be violative of Section 8(e) of the Act, as shown, supra, p. 17, any present attempt by the Union to seek its enforcement, either by picketing or arbitration, compounds the Section 8(e) violation and is an independent violation of Section 8(b)(4)(A) of the Act, conduct which Section 10(l) was specifically designed to prevent.

Furthermore, since the Union's dispute, whether considered to be with the Bader Companies or with Golden Cycle, has not been resolved by lawful means, it may fairly be anticipated that unless enjoined, the Union will resume its conduct in violation of Sections 8(b)(4)(A), (B) and 8(e) of the Act. Douds v. International Longshoremen's Association, 242 F.2d 808, 811-812 (C.A. 2, 1957); Solien v. Miscellaneous Drivers and Helpers Union, 440 F.2d 124, 127 (C.A. 8, 1971), cert. denied, 403 U.S. 905; Cf., Squillacote v. Graphic Arts Int. U. (GAIU) Local 277, supra, 517 F.2d at 1023.

Finally, there is the danger that the Bader Companies will suffer irreparable injury in the absence of injunctive relief, and this factor, although not dispositive, further demonstrates the need for an injunction. See Danielson v. Local 275, Laborers, 479 F.2d 1033, 1037 (C.A. 2, 1973); Kaynard v. Independent Routemen's Ass'n., supra, 479 F.2d at 1073. For, as this Court has observed, renewed attempts to enforce Article 50(B) will place a "continuing cloud" both on the transaction between the Bader Companies and Golden Cycle and on any possible future transactions which the Bader Companies may wish to enter into. See McLeod v. A.F.T.R.A., New York Local, 234 F. Supp. 832, 841-842 (D.C.S.D. N.Y., 1964), aff'd, 351 F.2d 310 (C.A. 2, 1965); Danielson v. International Organization of Masters, Mates and Pilots, AFL-CIO, 521 F.2d at 747.

In short,it is submitted that since there is reasonable cause to believe that the Union's conduct was violative of Sections 8(b)(4)(A),(B) and 8(e) of the Act, injunctive relief is just and proper to prevent a resumption of such unfair labor practices, to protect the policies and remedial purposes of the Act, and to preserve the status quo pending adjudication by the Board of the underlying unfair labor practice charge.

CONCLUSION

In view of all the foregoing, it is respectfully submitted that the court below committed reversible error in failing to conclude that there was reasonable cause to believe that the Union was violating the Act and that injunctive relief was just and proper. Accordingly, the decision of the court below should be reversed, and the case remanded for the entry of an order granting a temporary injunction as prayed for in the petition to the court below.

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MAY, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-6052

SAMUEL M. KAYNARD, Regional Director
of Region 29 of the National Labor
Relations Board, for and on behalf of
the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

LOCAL 814, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Respondent-Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 1976, two copies of Brief for Petitioner-Appellant were duly mailed in a government franked envelope to the following:

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